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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent, Johnson Controls, Inc., while opposing the grant of certiorari, does not take issue with the central grounds militating in favor of plenary review developed in our petition.

(a) Johnson Controls concedes, as it must, that the courts of appeal *are* in substantial disarray concerning the appropriate Title VII standard to be applied in judging the validity of employer fetal protection policies that exclude substantially all women from job opportunities. Specifically, respondent agrees that

> although *Wright* [*v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982)] and *Hayes* [*v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984)] had allocated the burden of persuasion to the employer on the issues of substantial fetal risk and whether transmission of that risk was confined to the mother, the court below [held] that . . . the ultimate burden of persuasion . . . remained with [the plaintiff]. [Respondent's Brief in Opposition ("Br. Opp.") 17].

In addition, respondent recognizes that the court below held that "Johnson Controls' policy was also entirely lawful pursuant to a BFOQ defense, which *Wright* and *Hayes* had declined to follow." Br. Opp. 18. And respondent concedes as well that these "analytical issues . . . might well be significant in the future fetal protection cases." Br. Opp. 25.

(b) Johnson Controls, moreover, does not respond to our demonstration that the Seventh Circuit's alternative holdings here are each squarely in conflict not only with those of other courts of appeal, but also with several cases in this Court, notably *Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989), *City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702 (1978), and *Western Airlines v. Criswell*, 472 U.S. 400 (1985), and with the current position of the Equal Employment

Opportunity Commission, the agency charged by Congress with initial enforcement of Title VII.[1]

(c) Nor does Johnson Controls refute our showing (Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Pet. Cert." at 27-30) that given the number of hazards that do in fact pose *some* measure of fetal risk in the modern workplace, the questions of whether and under what circumstances employers may exclude substantially all women from jobs posing those hazards are questions of the greatest practical significance to the situation of women in the workplace.[2]

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[1] Johnson Controls does note that the EEOC *previously* was of the view that fetal protection cases should be decided under a business necessity approach. Br. Opp. at 17.

Presently, however, the EEOC has squarely concluded that as applied by the Seventh Circuit, a business necessity framework "is wholly inconsistent with settled Title VII law." Pet. App. 135a. Moreover, while the EEOC intends henceforth to investigate fetal protection cases on the premise that a bfoq defense *may* be applicable, the Agency recognizes that the issue is ultimately one for the courts, and that there is a circuit conflict on this question. Pet. App. 135. Finally, the EEOC recognizes that the Seventh Circuit *applied* the bfoq defense in a manner inconsistent with the decision of this Court in *Western Airlines v. Criswell, supra*, and that of the Fifth Circuit in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). Pet. App. at 136a-137a; 138a & n.11; 144a.

[2] Respondent does suggest that the court of appeals answer to these questions is of limited practical significance since the court below validated only fetal protection policies based on actual proof of a risk to fetal health, not merely "myths and assumptions". Br. Opp. 25. However, the ruling at issue does *not* require the employer to prove a risk to fetal health. Rather, under the Seventh Circuit's analysis, the burden would be on the *employee* to prove that there is *no* such risk; given the nature of scientific uncertainty, that opens up the possibility that sex discrimination will be approved in a broad range of circumstances. Furthermore, the kinds of situactions surveyed in the dissents below—ranging from toxic exposures to exposure of health care and child care workers to infectious diseases to exposure of workers to automobile injuries and other physical injuries that can harm the fetus—are not limited to situations in which the risks are only imagined ones.

The hard Title VII questions that must be answered thus go well

Thus, Johnson Controls in effect concedes that the very significant legal questions raised by the Seventh Circuit's decision in this case *do* merit this Court's attention, and seeks to persuade this Court only that the certiorari petition should be denied to " 'await a day when the issue[s are] posed less abstractly'." Br. Opp. 19. As we now show, this case poses the question of the appropriate Title VII standard to be applied in judging exclusionary fetal protection policies as concretely as it will ever be posed. And there is no aspect of the decision below, or of the history of this litigation, that will in any way impede this Court's ability to resolve the fundamental and critical gender-based discrimination issues posed here.

2. Johnson Controls maintains, first, that given the court of appeals' alternative holdings, resolution of the central issues presented in this case—whether a bfoq or business necessity defense applies, what the elements of the applicable defense or defenses are, and how the burdens of persuasion are to be allocated—cannot affect the outcome and are therefore mere abstractions. Br. Opp. 18-19.

That assertion is simply wrong. As one might expect, the eleven judges of the Seventh Circuit, sitting en banc, were not simply wasting their valuable time by debating at length abstract legal standards, inapplicable to the case

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beyond whether there is scientific evidence of *some* level of fetal risk to include: what level of risk, if any, would justify the *entire* exclusion of women who cannot prove infertility (and not just pregnant women); whether fetal risk can be treated for Title VII purposes as a category unto itself, without regard to other risks to health caused by the same occupational circumstances; and which party, the employer or the excluded employee, prevails where, as is often the case, there is scientific uncertainty as to the precise level of risk, the question whether the risk is confined to fetuses carried by female workers, or the possibility of limiting the risk.

The point of the matter for present purposes is that the legal rules adopted by the Seventh Circuit for answering these question are likely to provide employers in the future with broad authority to exclude many women from job opportunities.

before them. Rather, the Seventh Circuit's choices among the various analytic approaches available *did* directly determine the outcome of this case in that court. Consequently, the decision of this Court after plenary consideration upon the question presented for review would certainly have a " 'meaningful' result on the outcome in the case at hand.' " *Cf.*, Br. Opp. 19.

For example, if this Court, after plenary consideration, were to adopt the view of Judges Easterbrook and Flaum, and to hold (1) that this case must be analyzed as a disparate treatment case; and (2) that the only defense available in such a case—the bfoq defense—cannot as a matter of law apply to a fetal protection policy, then the summary judgment granted by the district court and affirmed on appeal would have to be reversed.

Concommitantly, if the Court, after examining the issues on the merits, were to conclude, as did Judges Posner and Cudahy below, 1) that this case must be analyzed as a disparate treatment case; 2) that under certain circumstances a bfoq defense *can* apply to justify a fetal protection policy; and 3) that the Seventh Circuit majority misapprehended the elements of that very narrow defense, and therefore erroneously affirmed the judgment in favor of the employer, the result on the merits would be to reverse the summary judgment for defendant *and* to remand for trial.

Alternatively, this Court might, after considering this case in full, concur in the conclusions of the Eleventh and Fourth Circuits, in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) and *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), that as a matter of law no bfoq defense applies to fetal protection policies *but* that an alternative defense is available under Title VII. If so, the Court would then have to address the questions of the elements of that defense, and of the allocation of burdens of persuasion within that defense. Depending upon the Court's answers to those two questions, the judgment below might be affirmed, or it might be reversed.

Finally, this Court, after plenary review, might agree in every respect with the alternative legal holdings of the Seventh Circuit majority, and might therefore reach the same end result in this case. But this possibility (which, for reasons indicated in the certiorari petition, is quite remote) surely does not mean that the *legal* issues in this case are of only "theoretical" significance. *Cf.* Br. Opp. 18. Rather, it is usually true, when this Court hears a case, that the Court *may*, after considering all the contentions of the parties on the questions presented for review, ultimately conclude that the court below did not err in any respect, and that the result reached below should therefore stand. Such an outcome does not make the questions presented any less worthy of review than a reversal, or turn the Court's opinion on the merits into an "advisory opinion." *Cf.* Br. Opp. 18.

3. Johnson Controls also insists that the court of appeals' conclusion that a *plaintiff* may have to bear the burden of persuasion on an employer's defense to a charge of facial sex discrimination does not merit this Court's review, despite the conflict on that critical practical issue with the Fourth Circuit in *Wright*, *supra*, the Eleventh Circuit in *Hayes*, *supra*, this Court in *Price Waterhouse v. Hopkins*, and the EEOC in its recent policy statement. As respondent sees that matter, because the Seventh Circuit reached the same *result* under the bfoq defense, while placing the burden of persuasion on the employer, as under the business necessity defense while placing the burden of persuasion upon the plaintiff, it must follow *despite* the court of appeals explicit statements to the contrary, that where the burden of proof is placed does not matter. Br. Opp. 18.[3] The flaw in this reasoning is obvious: Johnson Controls *wrongly* assumes that the elements of the two defenses are the same.

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[3] The Seventh Circuit devoted several pages to the burden of persuasion question, and expressly stated that in its view, the allegation of the burden of persuasion is critical to the outcome that court reached on the business necessity defense. Pet. App. 30a-35a.

In fact, the bfoq defense, as conceived by the court of appeals, *does not include any inquiry into the question whether "the risk of transmission of potentially harmful lead exposure to unborn children is substantially confined to fertile female employees."* Pet. App. 33a; *see* Pet. App. 50a-59a. And it was with regard to this precise inquiry that the allocation of the burden of persuasion was dispositive below with regard to the business necessity defense. *See* n.3, *supra.* Since the two defenses, according to the court of appeals, have different elements as well as different burdens of persuasion, it is improper to extrapolate, as respondent would, from the fact that the court below concluded that respondent carried its bfoq burden of persuasion, that the court below would have concluded that respondent would have carried its business necessity burden of persuasion.

Consequently, had the Seventh Circuit agreed with the view of the Eleventh and Fourth Circuits that no bfoq defense is available for fetal protection policies, and further agreed with those courts as to the placement of the burden of persuasion on the alternative, business necessity theory, the outcome of this case below may well have been different. In sum, the two circuit conflicts identified in our certiorari petition involve critical questions that *do* influence the results in fetal protection cases and *were* central to the result in this case in the court below.

4. Respondents' final attempt to persuade this Court that this case is somehow defective as a vehicle for deciding the important questions presented for review is the repeated assertion that the UAW in the proceedings below waived the right to judicial consideration of an issue necessarily critical to a challenge to an employer's fetal protection policy. Br. Opp. 12, 19-21, 25. In fact, the issue upon which a waiver is asserted is in no way critical to the resolution of this case at this juncture, nor was there a broad waiver below as to any present relevant issue.[4]

[4] As respondent notes in a variation on its "waiver" point, we do not argue in our *certiorari* petition that if the court below is right on the law, the affirmance of summary judgment is wrong because there are contested factual issues. We do not make any such argument not because we believe that there are no such factual issues but because we believe that there is no certworthy dispute in that regard. And as already pointed out, respondent is plainly wrong in its repeated refrain that our focus on whether the court below got the law right reduces this live contested case to an abstract controversy.

The question as to which Johnson Controls contends the UAW made a critical concession is the availability of feasible alternatives to the challenged fetal protection policy. That issue, according to the court of appeals, is the *third* possible element of a business necessity analysis as applied to fetal protection policies, and, as such, need be addressed only if the employer prevails as to the first two elements. *See* Pet. App. 38, relying upon *Wards Cove Packing Co. v. Atonio*, — U.S. —, 109 S. Ct. 2115, 2126-27 (1989). For four reasons, the UAW declination to present affirmative evidence on this far-down-the-line question is of the most minimal significance at this stage of the proceedings.

First, the UAW simply declined to come forward with evidence on the question of feasible alternatives, for purposes of contesting respondent's *summary judgment* motion. The Union in no way waived its right to present such evidence at trial if the summary judgment is reversed, as we believe it should be, and the case remanded for trial.

Second, at the time the UAW made its litigation decision the district court had held that a fetal protection purpose can *not* constitute a bfoq. The Union therefore did not on appeal address the question whether, if applicable, the elements of a bfoq defense had been made out. Because it was the court of appeals that for the first time in this litigation indicated that a bfoq defense may be applicable, the UAW cannot be held to have waived the legal contention that the employer had failed to meet *its* burden of proving the proper elements of the bfoq defense, in-

cluding, *inter alia*, whether it is "impossible or highly impractical" to deal with employees on an individualized basis. *Western Airlines v. Criswell*, 472 U.S. at 414.[5]

Third, the UAW would be obliged to *come forward* with evidence on the feasible alternatives issue only if this Court were to affirm the court of appeals' basic premise that this case, despite explicit, gender-based discrimination, can be analyzed as if it involved a neutral policy with only a disparate impact on women. Our basic position, however, is that the entire disparate impact/business necessity theory is inapplicable here. If this view is adopted, then there would be no reason to reach the application of the elements of the business necessity defense, and the purported waiver would be irrelevant.

Fourth, even if this Court were to agree with the Court of Appeals that disparate impact analysis is appropriate, that would still leave the question whether the two elements of the business necessity defense that arise *prior to* the feasibility question were made out on the present record. And as to those—particularly as to whether lead at the levels of exposure here at issue causes fetal harm to the offspring of male employees, or harm to the health of adult employees—the court of appeals placement of the burden of proof upon the UAW was, as recounted above, both in error and critical to its result. Thus, unless this Court were to further agree with the court of appeals that contrary to established Title VII law, this Court's decision in *Price Waterhouse v. Hopkins*, the views of the other circuits that have addressed the issue, and the EEOC, a *plaintiff* can be required to bear the burden of any scientific uncertainty concerning the

[5] Indeed, the court of appeals did *not* treat the Union as having waived any aspect of the bfoq question. Rather, the court below analyzed at length on the merits the question of whether the fetal protection policy here was reasonably necessary (albeit, in our view, erroneously and without regard to the standards established by this Court) Pet. App. 52a-55a; *see* Pet. Cert. 23-24 & n.16.

effect of a toxic substance upon male employees and their offspring, there would again be no reason to address the feasible alternatives issue.[6]

The central contention in our certiorari petition is that, given the conflict among the circuits, with this Court's cases, and with the EEOC generated by the court of appeals basic *legal* analysis and the importance of the questions presented to the future of women's employment prospects, the case merits plenary review. Respondents suggestion that this case cannot sensibly be decided without addressing a feasible alternative issue on its particular facts grossly distorts what is at stake. In truth, there is no possibility that such a factual issue will impinge on this Court's consideration of the central and critical *legal* issues presented for review.[7]

[6] Contrary to Johnson Controls' contention, Br. Opp. 22-24, the court of appeals treated the validity of animal studies in generic terms and not smiply on that court's assessment of the validity of the *particular* animal studies submitted. The court below explicitly recognized that the UAW *did* present expert testimony that "animal studies had demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure." Pet. App. 34a. That court nonetheless concluded that the UAW's witnesses' opinions based on animal studies could be ignored because of "the wide chasm between the results of animal studies and a conclusion of genetic harm allegedly transmitted through the male human being," and faulted the UAW on the ground that the Union did not (although in fact it did) "present[] any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure." Pet. App. 34a. The fair reading of these passages, as dissenters below and the EEOC have recognized, is that the Seventh Circuit ruled *as a matter of law* that the Union could not sustain its burden of proof on the male mediation issue without human studies.

[7] We note that since the filing of the certiorari petition in *Johnson Controls v. California Fair Employment and Housing Commission*, —— Cal. App. 3d —— (Feb. 28, 1989), the California Court of Appeal held Johnson Controls' fetal protection policy, as applied in California, is *invalid* under *state* fair employment law. (Because

CONCLUSION

For the above stated reasons and those set out in the certiorari petition, that petition should be granted.

Respectfully submitted,

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the opinion is not yet generally available, we are lodging copies with the Clerk's Office for the Court's convenience.)

The California statute is ordinarily interpreted to parallel Title VII except " '[w]here Title VII precedent does not appear sound or would conflict with the essential purposes of the Act' " Slip op. at 30. The California Court of Appeal so fundamentally disagreed with the legal analysis of the opinion below, however, both as to the scope of the bfoq defense and as to the availability of an alternative defense, for reasons similar to those expressed in the dissents below and in our certiorari petition, that it refused to follow the Seventh Circuit's conclusions as to the validity of the *very same policy* at issue here. Slip Op. at 36, 40. In so holding, the California court relied upon the EEOC's recent policy guidance document, and noted as well the disarray among the federal courts that have addressed fetal protection issues. Slip Op. at 30 n.7, 42-48.

Thus, the conflict between the decision below and established Title VII principles has now contributed to a stiuation in which a *single* fetal protection policy is valid under federal law but invalid under state law, although the state usually attempts to avoid such a conflict.